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No. 93-1290

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

LOS ANGELES LAND COMPANY, PETITIONER

v.

BRUNSWICK CORPORATION, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded – after "'review[ing] the evidence on [the] factual issues in the light most favorable to [petitioner] and draw[ing] all reasonable inferences in its favor'" (Pet. App. 5a) under the "clearly established" *du Pont* test for monopoly power (*id.* at 6a) – that the evidence was insufficient to support the jury's finding that the owner of a single bowling center in an isolated portion of Los Angeles County possessed "monopoly power."

RULE 29.1 STATEMENT

Respondent Brunswick Corporation has no parent company and no subsidiaries other than wholly owned subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 6 F.3d 1422. The district court's only substantive opinion in this case (App., *infra*, 1a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1993. A petition for rehearing was denied on November 12, 1993. Pet. App. 36a. The petition for a writ of certiorari was filed on February 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. Entry into the retail bowling business is easy. Uncontradicted testimony in the record of this case showed that there are 8000 bowling centers in the United States, and

as many as 100 new ones open each year.[1] Uncontradicted testimony in the record of this case shows that 45 new bowling centers opened in the United States in 1988. Brunswick supplied the equipment for 18 (40%) of them; the other 27 got equipment elsewhere.[2] Deutsche Credit Company (DCC) financed 12 (27%) of the equipment purchases; the other 33 bowling centers used their own capital or got financing elsewhere.[3] It is, in short, painfully obvious from the record in this case that one does not need to turn to Brunswick or to DCC in order to build a new bowling center.

Petitioner's response to these inconvenient facts (shown by uncontradicted evidence in the record) is to ignore them. Petitioner thus asserts at the outset (Pet. 2) that "Brunswick was the dominant manufacturer of bowling equipment purchased by new bowling centers in the United States."[4] It

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[1] DSER 546-547, 791-792. In this brief in opposition, we use the following abbreviations to refer to the record below: "RT" means the Reporter's Transcript of the trial; "ER" means the Excerpts of Record filed with Brunswick's opening brief on July 29, 1992; "SER" means the Supplemental Excerpts of Record filed with petitioner LA Land's opening brief on October 7, 1992; and "DSER" means Defendant's Supplemental Excerpts of Record filed with Brunswick's reply brief on December 7, 1992.

[2] DSER 989-990; see also DSER 748-749, 792.

[3] DSER 989-990; see also DSER 986-987.

[4] Petitioner relies on anecdotes, salesmen's puffery, and an apparent assertion that new bowling centers will accept only an "integrated package" of bowling equipment and that only Brunswick offered such a package. With 27 out of 45 new bowling centers in the United States *not* buying their equipment from Brunswick, however, those assertions cannot possibly be correct. In any event, petitioner expressly abandoned in the district court the theory that Brunswick was dominant in equipment, telling the court it would "not purport to show" that Brunswick had a supply monopoly. DSER 738; see also Pet. App. 12a.

then makes the even more outlandish statement that "[DCC] was one of the very few lenders, if not the only lender, that would even consider extending credit for bowling equipment purchases in the relevant market during the relevant period." Pet. 3. Petitioner's assertion stands in marked contrast to the uncontradicted record evidence that 73% of all new bowling centers in the United States in 1988 did not obtain equipment financing from DCC, and to the court of appeals' correct statement that "some 19 different lenders have financed purchases of Brunswick equipment since 1986" (Pet. App. 11a).

This is, in short, not the case petitioner has described in the petition. We will now describe what this case *is*.

2. Petitioner claims that it wanted to build a bowling center in Palmdale, California. In 1988, the only bowling center in the isolated area of Los Angeles County known as the "Antelope Valley" was Brunswick's Sands Bowl in Lancaster, California. Petitioner claimed that, by having the only retail bowling center in the area, Brunswick had a "monopoly" within the meaning of Section 2 of the Sherman Act, 15 U.S.C. § 2. Pet. App. 2a-3a; 4/25/91 (p.m.) RT 43-44 (petitioner's closing argument to the jury).

It is undisputed that Brunswick was willing to sell petitioner bowling equipment if it paid the agreed price of approximately $1 million. RT 704. Petitioner's owner, Alan Goodman, had a personal net worth of $11 million; he could have come up with the necessary cash either out of his own pocket or by borrowing against his substantial personal assets. DSER 1030-1036. Instead, petitioner wished to purchase the bowling equipment on a highly leveraged basis with corporate debt, using the equipment as the collateral, under an established program in which DCC makes loans on Brunswick equipment if Brunswick first gathers the necessary financial information and agrees to guarantee the loan. DSER 786-788, 910-913, 917-921, 929-932, 978. Moreover, as a condition of the equipment purchase, petitioner

asked Brunswick to provide it with a letter promising that Brunswick would not build a competing center in Palmdale. DSER 113-120, 364-366, 549.

3. When DCC did not make the loan and Brunswick did not provide the no-competition letter but instead built its own center in Palmdale, petitioner did not build its bowling center. It did not use its own funds to buy the Brunswick equipment, nor did it buy equipment from any of the other sources from which it was indisputably available. Instead, petitioner sued Brunswick under Section 2. Petitioner contended that Brunswick caused the failure of petitioner's project – in particular its failure to obtain equipment financing – by (1) taking too long to send petitioner's loan application paperwork to DCC and (2) preparing a "market survey" (required by DCC) that concluded that there was room for one but only one new bowling center in Palmdale. Pet. App. 4a, 13a-14a; ER 108-119. (Petitioner also claimed, see Pet. App. 4a, that Brunswick interfered with its ability to secure the services of a particular construction company, but it is undisputed that petitioner had access to competent construction services if it could secure equipment financing. DSER 407-408, 432.)

Petitioner's case was plagued from the outset by confusion. See Pet. App. 12a. Thus, early on in the case, the district court denied Brunswick's summary judgment motion but commented:

> The Court cautions plaintiffs * * * that the theory of their case is confused and problematic.
>
> Despite plaintiffs' insistence that the Brunswick market study is patently false, because the survey states that Palmdale can support only one new center, plaintiffs themselves argued to this Court during a prior hearing that Palmdale could only add one new center. Moreover, plaintiffs must offer proof that Brunswick's position as a manufacturer of bowling equipment gives Brunswick

> control of the many banks from which plaintiffs could receive financing. There is already some evidence that Brunswick has no such power in the financial markets.

App., *infra*, 4a. The district court was equally critical of petitioner's case when Brunswick moved for a directed verdict at the close of petitioner's evidence. See Pet. App. 13a (quoting RT 1648). Nevertheless, it allowed the case to go to the jury, which returned a general verdict in petitioner's favor.

4. On appeal to the Ninth Circuit, Brunswick argued that the antitrust verdict must be overturned on each of four grounds: (1) that the evidence was insufficient to show monopoly power; (2) that petitioner had failed as a matter of law and fact to prove exclusionary acts by Brunswick; (3) that petitioner had failed to prove causation; and (4) that petitioner's claimed damages were impermissibly speculative.[5] At oral argument, the court of appeals expressed in no uncertain terms its skepticism that petitioner had proved exclusionary acts by Brunswick causing harm to petitioner. Most pointed were the remarks of Judge Kleinfeld:

> [Brunswick's] position basically is, if you want to compete with us, compete, but do it on your own nickel. * * * What I saw as the crux of the case, really, the thing that prevented LA Land from getting into the market was they needed a promise not to compete by Brunswick; they needed a monopoly in the market in order to borrow the money, in order to participate in the manner that they wished. If you wouldn't give them a monopoly, then they didn't have the borrowing power to participate according to their business plan. You refused to give them a monopoly, you threatened to compete, that shot down their business plan, and they say that that's a violation of the

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[5] Brunswick's fifth argument on appeal was that a tort judgment based on the same theories as petitioner's antitrust case could not stand. The court of appeals agreed. Pet. App. 14a-18a.

> antitrust laws, for you to threaten to compete. * * * [I]t's pro-trust rather than antitrust.

The Ninth Circuit nevertheless did not reach the "exclusionary act," causation, or damages issues.[6] Instead, it unanimously found it sufficient to "begin and end our inquiry with the question whether the record supports the jury's finding on the first element, i.e., that Brunswick possessed monopoly power in the relevant market." Pet. App. 6a. The panel reversed because it "believe[d] L.A. Land's whole antitrust claim founders on this issue." *Ibid.* Applying the "clearly established" test of *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956), the court held – properly "[v]iewing the evidence in the light most favorable to" petitioner – that "the record simply does not support a finding that Brunswick had power to control prices or exclude competition" in the relevant market. Pet App. 6a.[7]

Petitioner claims that "the appellate court reversed the jury's verdict on the ground that Brunswick, *as a matter of law*, could not possess monopoly power." Pet. 6 (emphasis added). Nothing could be further from the truth.[8] The

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[6] The petition is simply in error in asserting that "the Ninth Circuit accepted[ ] that Brunswick committed 'anticompetitive' acts to keep [petitioner] out of the market." Pet. 4. The Ninth Circuit merely "[a]ssum[ed] without deciding that the record fully supports findings" of anticompetitive acts. Pet. App. 10a. One can reliably glean the Ninth Circuit's negative view of petitioner's claims of exclusionary acts, however, not only from the oral argument comments but also from the court's directive (Pet. App. 14a-19a) to enter judgment in Brunswick's favor on the tort claims, claims that rested on the same factual basis as the exclusionary act claims asserted under federal antitrust law.

[7] Petitioner expressly concedes that use of the *du Pont* test was proper. Pet. 10.

[8] Perhaps petitioner is engaged in wordplay. It *is* true that "judgments that are not supported by the requisite minimum of proof are invalid *as*

Ninth Circuit held that *the evidence was insufficient* to show that Brunswick possessed such power. Reiterating again and again the fact-bound nature of its conclusions, the court said that, "[i]n the factual circumstances of this case, a rational jury could not conclude that Brunswick possessed the power to exclude competition from the relevant market" (Pet. App. 13a),[9] and that "the evidence does not support a finding of monopoly power" (*id.* at 14a). And the court made it clear early in its opinion that it was *not* purporting to rule on any of the market power issues as a matter of law, as opposed to sufficiency of the evidence under the well-established "rational jury" standard: "The question whether a party possesses market power is essentially one of fact." Pet. App. 5a (citing *Oahu Gas Service, Inc.* v. *Pacific Resources Inc.*, 838 F.2d 360, 363 (9th Cir.), cert. denied, 488 U.S. 870 (1988)).[10]

In conducting its review of the sufficiency of the evidence, the court explicitly recognized that Brunswick's 100% share of the narrowly defined "market" in this case (*i.e.*, the one

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a matter of law." Griffin v. *United States*, 112 S. Ct. 466, 474 (1991). But when a court uses the phrase "as a matter of law" in *that* sense, it is describing a fact-bound conclusion, not a broad legal principle applicable across cases. *Ibid.*

[9] Petitioner repeatedly quotes this passage without acknowledging that it begins with the phrase "[i]n the factual circumstances of this case." See Pet. 7, 21.

[10] At no point did the court of appeals find it necessary to engage in any review more searching than traditional "sufficiency" review. In particular, the court placed no reliance whatever on *Brook Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993), *Eastman Kodak Co.* v. *Image Technical Services*, 112 S. Ct. 2072 (1992), or *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986). Petitioner's observations about those cases (Pet. 19-21), while perhaps of academic interest, have absolutely nothing to do with any question presented by the petition (see Pet. i) or by the court of appeals' opinion.

preexisting bowling center) could give rise to an inference of market power.[11] And it placed the burden on Brunswick to rebut that inference, not on petitioner to reinforce it. Pet. App. 6a-7a (quoting *Oahu*, 838 F.2d at 366) ("A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other *evidence* of a defendant's inability to control prices or exclude competitors.") (emphasis added).[12]

Examining the record evidence in detail, the court held that no rational jury could find monopoly power in the face of the defendants' actual showing of such inability. Among other things, the court considered and rejected petitioner's contention that difficulty in obtaining the $1 million in equipment financing typically needed for a venture of this sort is an "entry barrier." Pet. App. 11a-12a. The court conceded, on the other hand, that petitioner would have prevailed on the monopoly power issue if it had shown that Brunswick had a monopoly in the supply of equipment, but

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[11] The trial judge entered a pretrial order narrowly defining the market as "retail bowling services." ER 94-96. Brunswick, however, made clear before trial its intention to show "that we do not have monopoly power because of having the Sands Bowl in the Antelope Valley – that we do not have the power * * * to raise price willy-nilly just because there are not other bowling centers in the market." DSER 318. The court ruled, "you are not foreclosed from doing that." *Ibid.* And that is precisely what Brunswick did. The Ninth Circuit held, in a portion of the opinion that the petition does not challenge, that the record established Brunswick's lack of power to control price. Pet. App. 8a; see also notes 34, 36, *infra*. Indeed, Brunswick's prices were lower than those charged by petitioner at *its* bowling centers. Pet. App. 8a.

[12] The petition concedes (at 7, 10-11) that the inference from Brunswick's 100% "market share" is rebuttable by a showing of low entry barriers, and the point was also conceded below (LA Land C.A. Br. 25-26). The petition also concedes (at 7-8 n.4) that this case does not present the question whether antitrust plaintiffs or defendants bear the burden of introducing evidence on barriers to entry.

petitioner had explicitly waived this issue. *Id.* at 14a ("A supply monopoly theory, if it could be substantiated, logically would have led to proof of Brunswick's power to exclude competition in the retail bowling market.").

Contrary to petitioner's claim, however, the court did not hold that proving a supply monopoly was the *only* way petitioner could prove monopoly power. The court stated that petitioner could prove entry barriers (and hence monopoly power) under either of two alternative definitions, but had failed to meet either one of them, and it gave four examples of entry barriers, none of which existed in this case:

> Barriers to entry may be defined as *either* "additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants," *or* "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." Areeda & Hovenkamp, *Antitrust Law* ¶ 409 at 509-10 (1992 Supp.) (internal quotation omitted).[4] *The evidence of Brunswick's behavior * * * fits neither definition.*
>
> [4] The main sources of entry barriers are: (1) legal license; (2) control over an essential or superior resource; (3) entrenched buyer preferences for established brands or company reputations; and (4) capital market evaluations imposing higher capital costs on new entrants. Economies of scale may also be considered an entry barrier in some situations. Areeda & Turner, *Antitrust Law* ¶ 409b at 299-300 (1978). *L.A. Land points to no evidence which fits in any of these categories.*

Pet. App. 11a & n.4 (emphasis added).[13]

[13] Petitioner grudgingly concedes in two footnotes that the Ninth Circuit accepted these broad and flexible definitions of entry barriers. Pet. 14 n.7, 17 n.11. Petitioner proceeds to complain that the Ninth Circuit misapplied its own standards. See also Pet. 15 ("There was, in fact, evidence that would support the jury's verdict even under this overly narrow standard for entry barriers."). Of course, an allegation that the Ninth Circuit misapplied the standards it announced to a particular factual record is a matter of no concern to this Court. In any event, as we show

Notwithstanding all of the foregoing, petitioner throughout the petition treats it as conceded that there were significant entry barriers in this case. Pet. i, 8, 11, 13. The Ninth Circuit's opinion, however, reached the precise opposite conclusion. Compare Pet. 8 ("[t]he Ninth Circuit assumed entry was difficult") and Pet. 11 ("the court accepted – as it had to – that Brunswick possessed 100% of a relevant market in which entry was difficult") with Pet. App. 12a ("Thus, the record does not support a finding of significant entry barriers.").

5. Petitioner sought panel rehearing but did not seek rehearing en banc. The panel unanimously denied the rehearing petition on November 12, 1993, just two weeks after it was filed. See Pet. App. 36a.

ARGUMENT

The decision of the court of appeals is a fact-bound evaluation of the sufficiency of the evidence under settled legal principles. It simply does not present the two questions petitioner asks this Court to resolve because each of those questions *explicitly assumes* that there were barriers to entry (see Pet. i), whereas the court of appeals *held* (Pet. App. 12a) that there were not. Moreover, the decision is correct and is not in conflict with any decision of this Court or of another court of appeals.[14] No member of the panel dissented. Petitioner did not even *seek* review by the en banc court of appeals. Review by this Court of the fact-bound issues raised by petitioner on the unusual factual record in this case is plainly unwarranted.

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below, the Ninth Circuit was correct when it held (Pet. App. 11a, 12a) that this record shows the absence of entry barriers under *any* standard.

[14] Petitioner does not claim a conflict with another court of appeals and concedes that *this* Court "has never spoken on" the questions it seeks to raise. Pet. 13.

1. a. Petitioner's principal argument is that "the Ninth Circuit's requirement that a differential entry burden be shown is erroneous as a matter of law." Pet. 16. But the Ninth Circuit imposed no such requirement.

What petitioner calls the "differential entry burden" theory is the theory of economist George Stigler, the 1982 Nobel Prize winner. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 409′, at 525 (Supp. 1993) (discussing "Stiglerian" and "Bainian" theories of entry barriers). "Under this definition a barrier to entry is identified by 'additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants.'" *Ibid.* (citing GEORGE STIGLER, THE ORGANIZATION OF INDUSTRY Ch. 6 (1968)). It is a definition of entry barriers long followed by the Federal Trade Commission. See *Echlin Manufacturing Co.*, 105 F.T.C. 410, 485 (1985); *B.F. Goodrich Co.*, 110 F.T.C. 207, 222 (1988). Had the Ninth Circuit adopted that theory of entry barriers, it would have had sound economic and legal support for doing so. See *Echlin*, 105 F.T.C. at 485 (the Stiglerian "definition is now widely accepted in the legal and economic communities").

But the Ninth Circuit did *not* adopt Stigler's definition. It held that the evidence was insufficient to support a finding of entry barriers under "[ ]either definition" of entry barriers, Stigler's or that of economist Joe S. Bain. Pet. App. 11a. Under Bain's broad definition (which the Ninth Circuit quoted with approval, *ibid.*), entry barriers are *any* "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." AREEDA & HOVENKAMP, *supra*, ¶ 409′, at 525 (citing JOE S. BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES (1956)). By endorsing and applying two alternative definitions of entry barriers – Stigler's relatively narrow definition and one of the broadest definitions to be found anywhere – the Ninth Circuit cov-

ered the waterfront of possible definitions.[15] It has, in short, *not decided* the issue that petitioner contends this Court should review.[16]

Petitioner contends that, notwithstanding its clear endorsement of the Bain entry barrier test as an alternative to the Stigler entry barrier test, the court of appeals *applied* only the Stigler test when it rejected petitioner's contention that the difficulty of obtaining financing for bowling equipment is a barrier to entry. Pet. 17 n.10. Petitioner is mistaken. In that portion of its opinion (Pet. App. 12a), the court of

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[15] Economists have developed *many* different definitions of entry barriers. See 1 RICHARD SCHMALENSEE & ROBERT D. WILLIG, HANDBOOK OF INDUSTRIAL ORGANIZATION 476-535 (1989) (60 pages of conflicting definitions of entry barriers preceded by the observation that "[t]he literature on the organization of markets is replete with definitions of barriers to entry"); Richard Schmalensee, *Ease of Entry: Has the Concept Been Applied Too Readily?*, 56 ANTITRUST L.J. 41, 42 (1987) ("economists do not have a single, precise, reliable way of measuring ease of entry"); *id.* at 45 (conclusions about entry barriers depend "entirely on exercise of judgment," and "[t]here is no standard textbook formula being used"). The courts have barely begun to scratch the surface of this debate:

> Unfortunately, the courts are further ahead in recognizing that entry analysis is important than they are in understanding or articulating the dimensions of that analysis. So far, the only decisions to discuss extensively what are and what are not entry barriers are FTC decisions, especially *Echlin* * * *.

Janusz A. Ordover & Daniel M. Wall, *Proving Entry Barriers: A Practical Guide to the Economics of New Entry*, ANTITRUST, Winter 1988, at 12, 12.

[16] Nor is the "definition" of entry barriers an issue ripe for this Court's determination – even if this were a case in which a lower court *had* settled on a single, definitive test – given that the issue has not yet "percolated" in the lower courts. See note 15, *supra*. In this regard, it is noteworthy that petitioner makes no claim of a circuit conflict on this issue.

appeals relied on neither Stigler nor Bain. Rather than rely on those *generalized* definitions of entry barriers, the court straightforwardly applied principles stated in Professor Areeda's treatise *specifically* applicable to the contention that "capital costs" constitute an entry barrier. 2 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 409e (1978). As the authors write: "The mere fact that entry requires a large absolute expenditure of funds does not constitute a 'barrier to entry'; a new entrant is disadvantaged only to the extent that he must pay more to attract those funds than would an established firm." *Id.* at 303. Petitioner cites no authority – and we are aware of none – suggesting that the Areeda/Turner definition of entry barriers *in the cost-of-capital context* is erroneous.[17] And, even if there were error of some sort in applying that definition, that fact hardly would make this a certworthy case without a showing – impossible on this record – that the *judgment* of the court of appeals was incorrect.[18]

b. Whatever theoretical debates one might engage in about the definition of entry barriers – debates the Ninth Circuit did *not* purport to resolve – the Ninth Circuit unquestionably reached the right result in holding that entry is easy in the retail bowling business and that Brunswick's one bowling center in Lancaster, California, did not constitute a "monopoly." As the court of appeals held, "the district

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[17] Petitioner mischaracterizes the pertinent quotation from the Areeda treatise as merely an "isolated statement[ ]" (Pet. 17 n.10). To the contrary, Areeda and Turner begin their discussion of capital costs by stating this as the generally applicable test in the financing context.

[18] *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) ("our power is to correct wrong judgments, not to revise opinions"); *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956) ("[t]his Court * * * reviews judgments, not statements in opinions"); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 509-510 (1987) (opinion of Stevens, J.) ("this Court does not sit to edit the opinions of lower courts").

court should not have sent [this case] to the jury." Pet. App. 12a.

Despite disagreement about other subjects, virtually all economists agree that entry into *retail* markets is easy. See, *e.g.*, JOE S. BAIN, INDUSTRIAL ORGANIZATION 276-277 (2d ed. 1968) (citing both retail trades and "service industries" including local entertainment businesses as examples of industries in which entry is easy); EDWIN MANSFIELD, PRINCIPLES OF MICROECONOMICS 266-267 (3d ed. 1980) ("entry into retail trade tends to be quite easy" because "the capital and skill required for entry are generally rather modest"); WILLIAM G. SHEPHERD, THE ECONOMICS OF INDUSTRIAL ORGANIZATION 205 (1979) ("Most retail and other services have low barriers."); LEONARD WEISS, ECONOMICS AND AMERICAN INDUSTRY 379, 384, 387 (1961) (retailing, including businesses of scale similar to bowling centers, tends to be competitive because "there seems to be a continuous supply" of new operators, "ready to appear whenever prospects are good, and often even when they are not").

This Court, too, has recognized that a single retail outlet is unlikely to have the kind of immunity from competition that would justify calling it a "monopoly" under Section 2. *du Pont*, 351 U.S. at 392-393 ("A retail seller may have in one sense a monopoly on certain trade because of location, as an isolated country store or filling station * * *. However, this power * * * is not the power that makes an illegal monopoly."). And with good reason: if retail establishments were treated as Section 2 monopolies despite ease of entry, there would be countless monopolies throughout the economy, all subject to the kind of constraints on efficient unilateral behavior that this Court recently warned against in *Spectrum Sports Inc.* v. *McQuillan*, 113 S. Ct. 884, 892 (1993). Thus, despite large nominal market shares, the law does not readily characterize local retail establishments as

Section 2 monopolies when new competitive entry is easy.[19] The record in this case overwhelmingly confirms that conclusion with respect to retail bowling services in Palmdale, California.

The fundamental fact disproving the existence of barriers to entry in the retail bowling business is that actual entry (and exit) has occurred constantly throughout the United States over many years.[20] Entry *has* occurred throughout

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[19] *E.g.*, *Metro Mobile CTS, Inc.* v. *NewVector Communications, Inc.*, 892 F.2d 62, 63 (9th Cir. 1989); *Williamsburg Wax Museum, Inc.* v. *Historic Figures, Inc.*, 810 F.2d 243, 252 (D.C. Cir. 1987); *Borough of Lansdale* v. *Philadelphia Electric Co.*, 692 F.2d 307, 314 (3d Cir. 1982); see also *Ball Memorial Hospital, Inc.* v. *Mutual Hospital Insurance*, 784 F.2d 1325, 1335-1337 (7th Cir. 1986); *United States* v. *Waste Management, Inc.*, 743 F.2d 976, 984 (2d Cir. 1984); AREEDA & HOVENKAMP, *supra*, ¶¶ 518.3a-518.3b; WILLIAM J. BAUMOL, JOHN C. PANZAR & ROBERT D. WILLIG, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE 222, 477-479 (1982) ("[W]e can no longer accept as per se indicators of poor market performance evidence such as concentration * * *. Where markets are contestable, the presumption should be that intervention is unwarranted."); William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 947 (1981) ("Market share alone is misleading.").

[20] See RT 1147 (there are 8000 bowling centers in the country); RT 1168-1169, 1174 (of 8000 bowling centers in the United States, about 1 percent open and 1 percent close every year); RT 1670-1673 (there are 7500-8000 bowling centers in the United States; there are larger chains than Brunswick; new centers open near Brunswick centers all the time, in Southern California and elsewhere; specific examples of new non-Brunswick centers that have recently opened in competition with Brunswick centers in Southern California); RT 1881-1882 (Brunswick operates about 105 or 110 of the 7500-8000 bowling centers in the United States); RT 1891 (many bowling centers are "a logical expansion of an existing proprietor in a market who builds one more center and then another center"); RT 1931 (75-100 new bowling centers are built in the United States per year); RT 2415-2416 (American Bowling Congress publishes data that show how many new bowling centers have been certified every year; there were 45 new centers in 1988; Brunswick equipped 18 of

the country, and therefore just as easily *could* occur in Palmdale. That fact by itself precludes any finding of monopoly power. See ECONOMIC REPORT OF THE PRESIDENT 174 (Feb. 1994) ("Although market power is costly to society, these problems are of limited concern in markets in which new competition *can* quickly and easily appear. Then the exercise of market power is likely to be nonexistent or temporary * * *.") (emphasis added).

If Palmdale were differentiated in a relevant way from the rest of the United States, perhaps the history of entry and exit throughout the United States would not be conclusive, but Palmdale is not so differentiated. If anything, barriers to entry are *lower* in Palmdale than in other communities be-

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them, or 40%; DCC financed 12, or 27%); RT 2544 (Active West is the largest bowling center chain in Southern California); RT 1965-1968 (Brunswick takes a risk in every market that someone will "open[ ] a bowling center down the street"; specific examples of situations in which that has happened, including situations in which Brunswick has sold the equipment to the competitor); RT 536 (petitioner's witness discusses "five-fold increase in bowling centers" in the 1960s); RT 2518 (Alan Goodman, president of petitioner, discussing bowling center boom in the 1950s and 1960s: "I just thought that the equipment companies were so anxious to sell equipment that they would sell to everybody, and they would open up here and open up there and right across the street practically, and that created greater over-expansion and over-building"); RT 1659-1667 (describing bowling boom of the late 1950s and early 1960s: AMF and Brunswick "grew from very small companies to very large companies" by selling bowling equipment; "bowling centers were going up all over the country and a lot of people were getting into the business because it was very easy to get into the business"; Brunswick got into the retail bowling center business by repossessing equipment and centers); RT 61-62 (petitioner's opening statement) (in the Antelope Valley itself, a 24-lane center and a 10-lane center not owned by Brunswick have come and gone); RT 233 (10-lane A.V. Lanes closed in June 1987); RT 841-842 (24-lane center in Palmdale was a "qu[i]te good performer" but closed in 1979 because of a fire).

cause of Palmdale's rapid growth.[21] Thus, petitioner – far from urging that there are intrinsic barriers to entry in Palmdale – tried to prove at trial that Palmdale could absorb an instantaneous *tripling* of its capacity for bowling by going from one to three 40-lane centers.[22] Consequently, petitioner's theory of the case – that the market could support both petitioner's new bowling center and a new Brunswick bowling center – was fundamentally at odds with any notion that

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[21] *E.g.*, RT 64 (petitioner's opening statement) (discussing "Palmdale's incredibly fast growth" as "the fastest growing city in the State"); RT 98 (petitioner's opening statement) ("remember this is the fastest growing region in the State"); Exhibit 45 at 4-02948 ("phenomenal rate" of growth); RT 318 (petitioner's witness describes Palmdale as "one of the fastest growing cities in the nation at the time"); RT 389-390 (petitioner's witness: "[T]hat area was growing. I didn't know whether the area would support two [new bowling centers] at the time, but that area was growing so fast that presumably they, under any stretch of the imagination, could build another center, then or very soon."); RT 1254 (petitioner's damages expert: "Palmdale-Lancaster * * * [i]s the fastest growing or has been the fastest growing community in California in recent years. The population based on the 1990 Census in Palmdale-Lancaster is two hundred thousand people.").

[22] *E.g.*, RT 102-103 (petitioner's opening statement) (assertion that Palmdale could support two new 40-lane centers); RT 327 (petitioner's witness believes that two additional 40-lane centers would have been feasible in the Antelope Valley in 1988); RT 760 (petitioner's witness adopts the "view that even if [Brunswick] built a new bowling center in the Antelope Valley [petitioner] could have built [its] own center there and competed successfully against [Brunswick]"); RT 1275 (petitioner's damages expert: "the Palmdale-Lancaster area could have supported two new 40 center lanes [*sic*] as early as 1987"), 1287 ("there is adequate capacity for two centers and even more in that location"); RT 3102-3103 (petitioner's damages expert: 1990 Census data show that Palmdale-Lancaster "could certainly support three centers, * * * could easily support another center of 40 lanes with minimum competitive effects"); RT 3105 (petitioner's damages expert: "the position is even stronger today that there could be another 40 lane bowling center in Palmdale-Lancaster"); see also App., *infra*, 3a n.2.

Brunswick could maintain a retail monopoly by delaying or preventing petitioner's entry.[23]

When one focuses on what is needed to build a retail bowling center, it becomes equally clear that barriers to entry are not high and certainly are not under Brunswick's control. Land is freely available in many places; the availability of land and necessary city approvals in Palmdale is a matter of record in this case.[24] Construction services are likewise available from many competent builders, as petitioner expressly conceded.[25]

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[23] In a remarkable instance of self-contradiction, petitioner now argues that Palmdale was a "thin" market and that being a "thin" market "in itself constituted an entry barrier." Pet. 14. Petitioner never made that argument in the district court or court of appeals and may not raise it for the first time in this Court. *Sisson* v. *Ruby*, 497 U.S. 358, 359 n.1 (1990); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Petitioner's position in the court of appeals was that "the relevant market was large enough to support *two* new centers of the size of the proposed Twin Cities Bowl, even using Brunswick's conservative ratio of 1,000 to 1." LA Land C.A. Br. 17 n.18 (emphasis in original). In oral argument before the Ninth Circuit, petitioner's counsel stated: "the Antelope Valley is slightly larger than Kansas City, Kansas, and slightly smaller than Anchorage, Alaska. It is not a one-horse town."

[24] RT 74 (petitioner's opening statement) (petitioner had obtained "numerous city approvals"); RT 349-351 (petitioner's witness describes petitioner's lease of land in Palmdale and various uses to which it was to be put); RT 392 (petitioner had gotten plans approved by the city); RT 926-930 (petitioner had various approvals); RT 1811-1812 ("there was property available in other places" in Palmdale); RT 2106-2107 (there is much vacant land around petitioner's proposed site in Palmdale).

[25] RT 675-676 (petitioner's witness concedes contractors other than Timberlake can build bowling centers); RT 1134-1136 (specific examples of bowling centers built by contractors other than Timberlake); RT 1167-1168 (Timberlake can build a bowling center in 90 days, but "anybody can fast track a building"); RT 1174-1175 (Timberlake does not build any number close to the 80 new bowling centers that open per year; the average time to

Bowling equipment is available from Brunswick, AMF, and used-equipment dealers, and petitioner expressly waived any claim of supply monopoly.[26] The only remaining thing

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build a bowling center is 6-7 months, and there are construction companies that can build a center in 6-7 months); RT 1781 (Timberlake built 25-30 centers in the entire 1980s); 4/25/91 (p.m.) RT 72 (petitioner's closing argument) ("Yes, there were other builders.[ ] That's not disputed here.").

[26] RT 312 (petitioner's witness admits that "AMF is a vigorous competitor of Brunswick"); RT 367-369 (petitioner solicited an equipment proposal from AMF but never gave it serious consideration because its "preference" was for Brunswick); RT 982 (third parties known as "itinerants" sell bowling equipment); RT 1107-1108 (Brunswick has competition from AMF and "an awful lot of competition from * * * the itinerants"); RT 1146-1147 (AMF and itinerants have expertise in installation of equipment); RT 1853 (colloquy between court and petitioner's counsel) (disclaimer of any showing that Brunswick has monopoly power in bowling equipment); RT 1869-1876 (describing "intense competition" Brunswick faces in sale of equipment, from "itinerants" and others); RT 1953-1956 (itinerants put together are larger than Brunswick; discussion of supply competition in general); RT 2415-2416 (American Bowling Congress publishes data that show how many new bowling centers have been certified every year; there were 45 new centers in 1988; Brunswick equipped 18 of them, or 40%; Deutsche Credit financed 12, or 27%); RT 2419 (Brunswick has lost sales to Murrey, Great Lanes Bowling Supply, AMF, Easy Score; most of the 60% of the equipment supply market not held by Brunswick is held by open market contractors (itinerants); Bowling Proprietor Magazine carries page after page of advertisements by these companies); RT 2439-2441 (proprietor does not have to buy equipment all from one source; there are many suppliers of pieces of equipment; typically lanes and pinsetters, the two most expensive pieces of equipment, are bought from open market contractor; other companies are available for all sorts of equipment, as shown by the ads in the back of Bowling Proprietor Magazine); RT 2576-2579, 2586-2595 (bowling industry expert) (by far the most cost-effective way to build a new bowling center is to buy used pinsetters and lanes, both of which were widely available throughout the industry in 1988; active market for used equipment in 1988 demonstrated through pages of magazines with advertisements for used equipment); RT 3155-3156, 3160-3163 (petitioner's rebuttal witness testifies about bowling centers in

of significance needed to build a bowling center – and the only thing petitioner claimed it lacked – was money to pay for the bowling equipment.

Not only is money not under Brunswick's control by any stretch of the imagination, but also the amount of money at issue is just $1 million, a modest amount – so modest, in fact, that petitioner's owner (who had a personal net worth of $11 million, DSER 1030-1036) bragged under oath that he could raise that amount in one hour with one phone call.[27] It is particularly modest in comparison to the *$5 million* in profits (after reducing to net present value) that petitioner's damages expert claimed petitioner would make net of its costs to build the center.

It cannot be seriously contended on this record that money is a barrier to entry.[28] In any event, there are *many* lenders

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the area with used equipment). See also Pet. App. 13a-14a ("L.A. Land never alleged that Brunswick had power to exclude from the market a potential competitor that chose to purchase equipment from a company other than Brunswick, nor did it prove that other suppliers did not exist").

[27] RT 2466-2468 (Alan Goodman, petitioner's owner, testified that if he needed one million dollars for a deal he was interested in he could get it "in one hour with a telephone call"); see also RT 2526-2531 (Goodman's personal net worth of more than $11 million); Ex. 1010 (same); RT 622 (equipment cost for petitioner's proposed Palmdale center was $1,200,000). Compare Schmalensee, *supra* note 15, 56 ANTITRUST L.J. at 47 ("really large initial capital costs," in the range of hundreds of millions of dollars, may temporarily raise entry barriers).

[28] It is of no moment that favorable credit terms were available under a Brunswick-sponsored program with DCC. In *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610 (1977) (*Fortner II*), this Court credited a factual finding by the trial court that particular credit terms were "not otherwise available in the Kentucky area" (*id.* at 616) but held that "that kind of uniqueness will not give rise to any inference of economic power in the credit market" (*id.* at 622) because it merely

available for bowling equipment, as well as old-fashioned cash.[29] *Petitioner*, of course, had trouble finding financing. But that reflects only that petitioner's project was a bad credit risk, not that there are barriers to entry. See App., *infra*, 4a & n.3. Petitioner owns several bowling centers and, at the time of trial, had never made a profit in any full year at any center.[30] Moreover, it insisted on doing busi-

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reflected a seller's willingness to offer favorable credit in order to sell its product. So too here, "bowling equipment financing" can be characterized as "hard to obtain" even "[t]hough there was also evidence that some 19 different lenders have financed purchases of Brunswick equipment since 1986" (Pet. App. 11a). But that characterization does not mean that Brunswick had economic power either in the credit market or, derivatively, in the retail bowling "market." Indeed, the court of appeals noted that, "[b]ecause L.A. Land rejected a supply monopoly theory, it apparently never did offer proof that Brunswick, as a supplier, controlled all sources of financing" (*id.* at 13a n.5) and that "L.A. Land * * * failed to prove that Brunswick controlled access to the productive assets of the retail bowling services market" (*id.* at 14a n.6).

[29] RT 2222-2224 (examples of companies that have financed bowling equipment at one time or another); RT 2256-2257 (Sanwa Bank, Walter Heller and Company, Circle Business Credit, Merrill Lynch Capital Resources, Chrysler Credit, and "innumerable regional and local banks" have provided loans to Brunswick customers); RT 2357-2360 (more on other sources of financing); RT 2411-2413, 2443-2445 (many customers provide their own financing; "[t]here are literally thousands of banks and financing institutions out there who every day are lending money for worthy projects"; local banks are "a major source of financing of bowling equipment"; "people show up with cash"); RT 2542 (Chrysler Financial plans to make $30-$40 million of bowling loans over the next year); RT 2466-2468 (petitioner's owner testified that if he needed one million dollars for a deal he was interested in he could get it "in one hour with a telephone call"); RT 458-459 (petitioner sought but was denied financing by Imperial Bank and Sanwa Business Credit, both of which made bowling loans).

[30] See Ex. 1464 (records of petitioner's losses); Ex. 2365 (same); RT 688-690 (testimony about petitioner's losses); RT 2510-2511 (petitioner's Chaparral Lanes in San Dimas had to go through workout because the

ness on a highly leveraged basis, using other people's money and placing virtually all the risk on the prospective lender.[31]

The record does not show high sunk costs or scale economies in this industry. Bowling equipment can be and frequently is resold on the secondary market.[32] Land, particu-

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performance of the bowling center did not allow petitioner to meet its original payment schedule); 4/25/91 (a.m.) RT 46 (Chaparral Lanes had six-figure losses); Thomas Weigt Dep. (attached to 14 RT) 38 ("[F]inancing any bowling center or any office building or any marina or your home or my home is based on the amount of money that we can put down, what our income is, the likelihood that we will be able to pay it back, the collateral value, * * * many other issues. * * * [I]t's not an issue of a lending institution. It's an issue of a customer.").

[31] RT 723-724 (petitioner sought 18-26% rate of return for its investors; putting in more equity and less debt to buy equipment would have reduced yield to 14-15%); RT 2517-2520 (petitioner's owner confirms insistence on high leverage); see also RT 1884-1885 (bowling centers can be built on a highly leveraged basis, but high leveraging led to problems in the 1960s and still does today); RT 1931-1933 (highly leveraged bowling centers have trouble finding financing); RT 1936-1937 (bowling centers with good cash flow but no profits cannot stay in business).

[32] RT 596-597 (petitioner bought used equipment for its bowling center in San Dimas and recognizes that one can buy used Brunswick equipment from others); RT 747-748 (used AMF equipment also is available); RT 1107-1108 (Brunswick has competition from AMF and "an awful lot of competition from * * * the itinerants"); RT 1113-1114 (Brunswick faces competition in used equipment from itinerants, AMF, Murrey, and a variety of other brokers and dealers across the whole country); RT 1997-1998 (itinerants can get used equipment); RT 2503-2505 (Alan Goodman, petitioner's president) (there was an active secondary market in used equipment in late 1987); Ex. 1066 (petitioner's "private placement memorandum") at 23 ("there is an active secondary market for selling used bowling equipment"); RT 2576-2579, 2586-2595 (bowling industry expert) (by far the most cost-effective way to build a new bowling center is to buy used pinsetters and lanes, both of which were widely available throughout the industry in 1988; active market for used equipment in 1988 demonstrated through pages of magazines with advertisements for used equipment).

larly in Southern California, tended to appreciate in value at the time relevant to this case. The building housing a bowling center comes closest to being a significant sunk cost, but petitioner's damages expert testified that even the building appreciates in value. RT 3109. For that matter, operating bowling centers *themselves* can be and constantly are resold.[33] And the frequent entry and exit by "mom-and-pop" operations as well as large, established chains shows that there are no particular scale economies (although experienced proprietors tend to do better than the many inexperienced proprietors who try to run bowling centers).[34]

Finally, on *this* record no rational jury could fairly regard Brunswick's conduct as a "barrier to entry," even if (see Pet. 16 n.9) Section 2 requires no more in the way of entry barri-

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[33] RT 723-724 (petitioner planned to provide its investors their return on equity by selling the property at the end of ten years); RT 2535 (there are brokers who buy and sell bowling centers; the same companies make services available to investors considering building a new center); RT 2545 (witness personally has participated in the sale of more than 200 bowling centers with a market value of $150 million); RT 3142-3146 (petitioner's rebuttal witness testifies to his experience in bowling center acquisitions).

[34] The two largest bowling-center operators in the world are AMF and Fair Lanes. DSER 693. Petitioner has never claimed that Brunswick had the power to keep AMF, Fair Lanes, or other large chains such as Active West (the largest chain in Southern California, RT 2544) out of the Palmdale "market." Petitioner has argued that those chains have shown no *interest* in Palmdale, but that is irrelevant; what is at issue is *barriers* to entry, not actual entry. The looming *threat* of new entry precludes any monopolistic power to control price. See *Bacchus Industries, Inc.* v. *Arvin Industries, Inc.*, 939 F.2d 887, 894 (10th Cir. 1991); *United States* v. *Baker Hughes Inc.*, 908 F.2d 981, 988 (D.C. Cir. 1990); *United States* v. *Syufy Enterprises*, 903 F.2d 659, 664 (9th Cir. 1990); *Will* v. *Comprehensive Accounting Corp.*, 776 F.2d 665, 672 & n.3 (7th Cir. 1985), cert. denied, 475 U.S. 1129 (1986); *Echlin Manufacturing Co.*, 105 F.T.C. 410, 484 (1985); 2 AREEDA & TURNER, *supra*, ¶ 505.

ers than anticompetitive acts. Brunswick committed no anticompetitive acts, as is fully laid out in the briefs filed in the court of appeals.[35] In particular, petitioner's entire case turns on the theory that it was entitled to financing provided by DCC. But DCC provided financing *only* when Brunswick guaranteed the equipment customer's loan. See Pet. App. 15a (quoting RT 2275). And Brunswick plainly had no obligation to guarantee its competitor's financing. There is "no duty to finance a rival, regardless of reasonableness." AREEDA & HOVENKAMP, *supra*, ¶ 738′m, at 890.

Moreover, as the court of appeals quite rightly noted, petitioner "never alleged that Brunswick had power to exclude from the market a potential competitor that chose to purchase equipment from a company other than Brunswick, nor did it prove that other suppliers did not exist." Pet. App. 13a-14a. Particularly in a case such as this one – where the alleged anticompetitive acts are all supposedly inadequate forms of *assistance* by Brunswick – the alleged anticompetitive acts of a company that controls no essential facility or bottleneck resource should not be deemed an entry barrier. Entry barriers pertain to the ability to block entry *generally*, not the ability to block a *particular* potential entrant. See George A. Hay, *Market Power in Antitrust*, 60 ANTITRUST L.J. 807, 820 n.50 (1992). Antitrust law, after all, protects competition, not competitors.[36]

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[35] Petitioner's statement that "the relevant facts are undisputed" (Pet. 13) is fanciful, at least if petitioner means to suggest that Brunswick does not dispute the "facts" stated in the petition, many of which are contrary to undisputed testimony or to concessions by petitioner's own witnesses. This Court may, of course, consider any argument supporting the judgment below that was presented to the court of appeals. *E.g.*, *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1981); cf. *Northwest Airlines, Inc.* v. *County of Kent*, 62 U.S.L.W. 4103, 4106 (U.S. Jan. 24, 1994).

[36] Petitioner errs in suggesting that a market is characterized by entry barriers unless the defendant shows that entry *would* occur, rather than

2. Petitioner's second argument is that the Ninth Circuit erred by holding as a matter of law that "a defendant cannot possess monopoly power in a downstream market unless it also possesses monopoly power in an upstream market." Pet. 17. Petitioner is right, of course, to suggest that such a holding would be erroneous. But petitioner is wrong to suggest that the Ninth Circuit held any such thing.

After a long discussion in which it carefully considered and rejected each of petitioner's claims that the record would allow a rational jury to find entry barriers (Pet. App. 7a-12a), the court of appeals observed (*id.* at 13a-14a):

> In the factual circumstances of this case, a rational jury could not conclude that Brunswick possessed the power to exclude competition from the relevant market without hearing evidence that Brunswick had monopoly control of the equipment market. L.A. Land never alleged that Brunswick had power to exclude from the

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that entry *could* occur. Pet. 12-13. Whatever the value of that test in a *merger* context, it would be quite perverse in the Section 2 context, where the absence of entry often reflects only that the defendant is *not* charging the kind of supracompetitive prices that invite entry. See *Syufy*, 903 F.2d at 668; *Waste Management*, 743 F.2d at 983 ("that such entry has not happened more frequently reflects only the existence of competitive, entry-forestalling prices"); *Echlin Manufacturing Co.*, 105 F.T.C. at 485 ("Complaint counsel suggests that entry barriers are high whenever it is unlikely that new firms will decide to enter the market. We cannot agree. Although high barriers indicate that entry is unlikely, reversing that statement goes too far."); ROBERT H. BORK, THE ANTITRUST PARADOX 195-196 (1978); Schmalensee, *supra* note 15, 56 ANTITRUST L.J. at 46 ("the lack of entry says nothing about barriers"); BAUMOL, PANZER & WILLIG, *supra* note 19, at 222 ("freedom of entry, indeed the mere threat of incursions by entrants into the market, may effectively discipline the monopolist, *even if entry is never successful*") (emphasis in original). The court of appeals observed in this case that petitioner "points to no actual evidence of supracompetitive pricing, and the record reveals none." Pet. App. 8a. The petition does not challenge that holding.

> market a potential competitor that chose to purchase equipment from a company other than Brunswick, nor did it prove that other suppliers did not exist. A supply monopoly theory, if it could be substantiated, logically would have led to proof of Brunswick's power to exclude competition in the retail bowling market. [Citation and footnotes omitted.]

The quoted passage, on its face, demonstrates that the court was holding only that the *factual circumstances of this case* required petitioner to show a supply monopoly, not that all plaintiffs in all cases must show monopoly power in two different markets. The factual circumstances of this case so requiring were several. One was petitioner's failure to overcome defendant's point-by-point showing of the absence of any *other* barriers to entry. Another was petitioner's insistence on purchasing equipment from Brunswick even though equipment was available from other sources, coupled with its insistence on obtaining Brunswick-guaranteed financing from DCC even though money was available from other sources. One who claims (as petitioner did) that an equipment supplier has an *obligation* to assist a competitor in a downstream market by selling the competitor equipment, assisting the competitor to obtain financing, guaranteeing the competitor's financing, and doing all of this on the competitor's chosen timetable, should indeed be required to show that there was nowhere else to turn. The court of appeals held no more than that.

3. *Even if* this case presented the issues described in the petition, and *even if* this Court thought that the Ninth Circuit had resolved those issues incorrectly, and *even if* this Court thought that the record could sustain a determination that Brunswick's one bowling center in the Antelope Valley gave it "monopoly power" – all erroneous assumptions – it would still be inappropriate to grant certiorari in this case because petitioner wholly failed to establish actionable exclu-

sionary acts by Brunswick. The claims of "exclusionary acts" in this case were not only unprecedented, but ludicrous.

The principal "exclusionary act" alleged in the petition seems to be that Brunswick "delayed" transmission of petitioner's loan application paperwork to DCC. No court, however, has ever sought to elevate complaints about the speed with which paperwork is processed into violations of Section 2 of the Sherman Act, punishable by treble damages in federal court. It would be especially bizarre to transform "delay" into a Sherman Act violation in a case in which the party allegedly guilty of delay was to be the *guarantor of the loan* that the paperwork was designed to secure. If Brunswick did not want petitioner to get a loan, it did not have to "delay" petitioner's paperwork; all it had to do was refuse to guarantee the loan – which it had every right to do – and DCC would not have made the loan. See Pet. App. 15a (quoting RT 2275).

Furthermore, petitioner's complaints about "delay" are simply inconsistent with uncontradicted evidence in the record. The alleged "delay" ended on July 28, 1988, when Brunswick *did* forward the paperwork to DCC (see Ex. 54), or at the latest on August 10, 1988, when DCC decided on the basis of the forwarded paperwork not to make the loan (see DSER 519, 522, 524, 946-947, 949, 972-973). Yet petitioner itself waited until significantly later – *August 22, 1988* – to forward to Brunswick for transmission to DCC evidence of construction financing. DSER 39-50, 81-82, 133-135, 383, 397-401, 448, 902-903. Evidence of construction financing was a *sine qua non* of equipment financing. Petitioner's own witness admitted that "[DCC] would require a commitment letter from a construction lender as a condition to providing financing for" petitioner's proposed Palmdale bowling center and that "a construction financing commitment was a necessary first step before [petitioner] could get equipment financing." DSER 394. Petitioner cannot obtain treble damages for alleged "delay" that ended long

before petitioner stopped dragging its own feet on critical aspects of its financing application.

The "false market survey" claim in this case was equally risible. That claim (which is inconsistent with the theory that Palmdale exhibited high entry barriers) is that the market could support *two* new bowling centers, whereas Brunswick's market survey said that there was room for only one. Petitioner asked the jury to conclude that Brunswick actually disbelieved its own survey, although petitioner never tried to contradict the survey in 1988 and had not a shred of contemporaneous evidence that anyone at Brunswick believed the market could support two new centers.

As the district court pointed out, however, "[d]espite plaintiffs' insistence that the Brunswick market study is patently false, because the survey states that Palmdale can support only one new center, plaintiffs themselves argued to this Court during a prior hearing that Palmdale could only add one new center." App., *infra*, 4a. Moreover, petitioner admitted at trial that "[t]he actual words in it [the market survey] are true" (DSER 427). Petitioner prepared its own market survey (Ex. 1005), which did *not* state that the market could support two new centers. See DSER 331-332 (author of petitioner's own survey claims to have held this view in 1988 but admits that he never stated it to anyone). The market survey prepared for Brunswick's internal use reached the same conclusion as the challenged survey: "the market cannot support two new bowling centers." Ex. 70 at 4-06959; see also *id.* at 4-06960, SER 137; RT 1738. And, in the *coup de grâce* to petitioner's theory, petitioner's own witness admitted that, "to [his] knowledge, nobody on behalf of [petitioner] or any of its affiliated entities ever expressed one word of criticism about the methodology, the data or the conclusions in the Brunswick market survey to [DCC]." DSER 367-368.

No court has ever allowed an antitrust case to proceed based on after-the-fact criticisms of survey methodology in circumstances like these. To the contrary, the established law is that one in petitioner's position must prove not only the intentional falsity of the statements made by its competitor but also its own inability to neutralize them.[37] Indeed, Areeda and Turner "would go further and suggest that such claims should presumptively be ignored."[38] But petitioner claims a right to treble damages based on criticisms it *never* presented to *anyone* at a time when those criticisms might (if believed) have led to actual entry into the marketplace as opposed to a windfall recovery of treble damages.

Last but not least, were this Court to consider the merits, it would have to confront the fact that petitioner *refused* to buy equipment from Brunswick (and thus to enter the market) unless it received a letter from Brunswick promising that Brunswick would refrain from competing in Palmdale by building a new bowling center of its own. See DSER 113-120, 364-366. As Judge Kleinfeld aptly put it (see page 6, *supra*), petitioner pursued a "pro-trust" lawsuit. This Court should not grant certiorari in order to prolong that lawsuit, or to rehash the factual record in a case that is unprecedented in federal antitrust litigation and unlikely to arise ever again.

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[37] *E.g.*, *National Association of Pharmaceutical Manufacturers, Inc.* v. *Ayerst Laboratories*, 850 F.2d 904, 916 (2d Cir. 1988); 3 AREEDA & TURNER, *supra*, ¶ 738a, at 279.

[38] *Id.* ¶ 738c, at 281; see also AREEDA & HOVENKAMP, *supra*, ¶ 738'm, at 890 ("[o]ne who seeks the opinion of a monopolist about a rival product is entitled merely to an opinion, regardless of how sound or objective it is").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1994

APPENDIX

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 88-5285 MRP

LOS ANGELES LAND COMPANY,
a California corporation;
et al.,

Plaintiffs,

v.

BRUNSWICK CORPORATION,
a Delaware corporation,

Defendant.

MEMORANDUM AND ORDER

[Filed Feb. 27, 1989]

Defendant Brunswick Corporation's Motion for Summary Judgment came on for hearing before the Honorable Mariana R. Pfaelzer on December 19, 1988. The Court, having heard argument and having considered the papers filed in support of and in opposition to the motion, denies defendant's motion.

DISCUSSION

Currently, defendant Brunswick[1] owns and operates the only bowling center in Palmdale, California, the "Sands Bowl." Plaintiffs Los Angeles Land Company, Sierra Palm Partners and West Lanes, Inc. have been attempting to construct and operate a competing bowling center, the "Twin Cities Bowl." Plaintiffs have failed, however, to obtain financing for their project; furthermore, plaintiffs have failed to find a contractor for it. Meanwhile, Brunswick has proceeded with its own plans to build its second bowling center in Palmdale.

The complaint in this action makes claims under Sections 1 and 2 of the Sherman Act and states pendent state statutory and common law claims as well. It seems clear that plaintiff's theory is that Brunswick, in order to maintain a monopoly over the Palmdale market for retail bowling services, prevented plaintiffs from building the Twin Cities Bowl. Despite the clarity of their generalized accusation that Brunswick caused the failure of the Twin Cities Bowl, however, plaintiffs have twice changed their factual theory of what Brunswick did to scuttle their project.[2]

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[1] Although this Memorandum and Order refer to Brunswick Corporation, the Court recognizes that plaintiffs' action fails to properly distinguish between defendant and its affiliated organizations: Leiserv, Inc. and Brunswick Bowling and Billiard's [*sic*] Corporation. The Court refers to the acts herein as acts of Brunswick for purposes of this Order only. Plaintiffs are required to reference the proper parties in all future papers.

[2] The complaint alleged that Brunswick had illicit understandings with a bank and a construction company. Plaintiffs claimed that pursuant to agreements with Brunswick, these parties engaged in a concerted refusal to deal with plaintiffs in the construction of their bowling center.

Later, in seeking to enjoin Brunswick from building its new bowling center, plaintiffs abandoned their theory of illicit agreements. Instead, plaintiffs argued that Palmdale could support only one new bowling center

Plaintiffs' current theory is that Brunswick interfered with plaintiffs' ability to obtain financing for the purchase of bowling equipment in two ways. First, Brunswick – which acted as an intermediary between plaintiffs and Deutsche Credit Corporation, the primary financier of bowling equipment purchases from Brunswick – allegedly delayed Deutsche in its review of plaintiffs' request for financing. Brunswick caused the delay by requesting irrelevant information from plaintiffs, refusing to forward needed information to Deutsche, and requesting that Deutsche put the application on the "back burner."

Second, plaintiffs claim that Brunswick submitted a false market survey to Deutsche; the survey stated that Palmdale could support only one new forty-lane bowling center. Plaintiffs argue that Brunswick's market study has so much influence over Deutsche's decisions that plaintiffs cannot obtain financing, now that Brunswick has commenced construction of a new center in Palmdale.

On the present record, plaintiffs have not met their burden of submitting sufficient evidence to make out a prima facie case of all of the elements of the alleged antitrust offenses. Nevertheless, the Court believes that plaintiffs should have more time to engage in discovery to support their claims. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322 ("Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on

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and that Brunswick alone delayed plaintiffs' efforts to secure financing for the Twin Cities Bowl, thereby breaching an affirmative duty to encourage competition.

Now, plaintiffs abandon the theory that Palmdale cannot support more than one new bowling center. The linchpin of plaintiffs' current theory is that Palmdale can support at least two new bowling centers and perhaps more.

which that party will bear the burden of proof at trial."). The Court cautions plaintiffs, however, that the theory of their case is confused and problematic.

Despite plaintiffs' insistence that the Brunswick market study is patently false, because the survey states that Palmdale can support only one new center, plaintiffs themselves argued to this Court during a prior hearing that Palmdale could only add one new center. Moreover, plaintiffs must offer proof that Brunswick's position as a manufacturer of bowling equipment gives Brunswick control of the many banks from which plaintiffs could receive financing. There is already some evidence that Brunswick has no such power in the financial markets.[3]

A final difficulty with plaintiffs' case is plaintiffs' failure to distinguish between the acts of defendant Brunswick and the acts of Brunswick's affiliates, the acts of Deutsche, and the acts of Timberlake. The Court will not impute, without a legally sound reason for doing so, the acts of others to defendant.

The Court recognizes defendant's frustration with plaintiffs' continually shifting legal and factual theories, and the Court wishes to warn plaintiffs that vague assertions of wrongdoing and eleventh-hour changes will not defeat a motion for summary judgment *after* plaintiffs have a reasonable time for discovery. A reasonable time for discovery in order to oppose a resubmitted motion for summary judgment is the end of July 1989. The Court is quite aware of the present discovery cut-off date, but is convinced that plaintiffs should be able to establish their prima facie case well before

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[3] *See* Plaintiffs' Opposition to Defendant's Motion for Summary Judgment at 29-30 (Both Heritage Leasing and First City Credit Corporation refused plaintiffs' application for financing based on reasons other than Brunswick's market study).

that time. Of course, that will require them to decide on a viable theory of recovery and support it by that time.

IT IS HEREBY ORDERED THAT defendant's Motion for Summary Judgment is denied without prejudice to its being resubmitted after plaintiffs have had a reasonable time for discovery.

DATED: February 27, 1989 /s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge